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OBSERVATIONS REÇUES SUR LE PROJET DE PROTOCOLE A LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLEVEMENT INTERNATIONAL D'ENFANTS, PROPOSE PAR LA SUISSE

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COMMENTS RECEIVED ON THE PROPOSAL BY SWITZERLAND FOR A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Document préliminaire No 12 de mars 2008
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on General Affairs and Policy of the Conference

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OBSERVATIONS PRELIMINAIRES DE LA RÉGION ADMINISTRATIVE SPÉCIALE DE HONG-KONG, RÉPUBLIQUE POPULAIRE DE CHINE

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COMMENTS FROM THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA

CHINE (RÉGION ADMINISTRATIVE SPÉCIALE DE HONG-KONG) – *CHINA (HONG KONG SPECIAL ADMINISTRATIVE REGION)*

Preliminary Comments from the Hong Kong Special Administrative Region of the People's Republic of China on the Draft Additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

General Comments

According to the experience of the Hong Kong Special Administrative Region (HKSAR) in implementing the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Convention), the HKSAR Government sees no urgent need to adopt the draft Protocol. Moreover, we have the following observations:

(a) the Convention aims to ensure speedy return of the abducted child. The additional procedures and measures proposed in the draft Protocol may delay the process to secure the return of the abducted child; and

(b) the Convention does not seek to prescribe substantive rules and procedures. This is to allow Contracting States more flexibility in implementing the Convention. Some of the proposed provisions in the draft Protocol may alter domestic rules and procedures substantively, thus causing difficulties to the Contracting States concerned. The additional cost and resource implications must be assessed carefully and weighed against the merit of draft Protocol.

Specific Comments

Article 2: Mediation or conciliation procedure

2. The first paragraph of Article 2 provides, inter alia, that the Central Authority or the judicial or administrative authority of the requested State shall endeavour to set up a mediation or conciliation procedure to obtain the voluntary return of the child or an amicable resolution.

3. Subject to other comments below, the above suggestion does not conflict with the spirit of Article 10 of the Convention. Article 10 provides that the Central Authority of the State where the child is shall take or cause to be taken all appropriate measures to obtain the voluntary return of the child. Likewise, the same applies to the second and third paragraphs of Article 2. From this perspective, the suggestions may be further explored or considered.

4. However, we have reservations about making it obligatory for the Central Authority, the judicial or administrative authority of the requested State to endeavour to set up a mediation or conciliation[1] procedure for the following considerations:

(a) mediation and conciliation are voluntary alternative dispute resolution processes. There is no guarantee that the parties concerned will reach an agreement on the voluntary return of the child or any other amicable resolution after mediation or conciliation.[2] In such circumstances, mediation and conciliation may have the undesirable effect of delaying the return of the child to his habitual residence;

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[1] To our understanding, "conciliation" is sometimes used interchangeably with "mediation", and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator and the other (conciliation) involving a more facilitative mediator.

[2] The use of mediation and conciliation is subject to the mutual consent of the parties. It may not be meaningful for the Contracting States to pursue mediation if the parties concerned are unwilling to do so.

(b) before assessing the feasibility of the proposal further, very careful consideration has to be given to the relationship / interface between mediation or conciliation procedure and the judicial proceedings under the Convention; and

(c) the financial and manpower implications may be significant. For instance, the authorities concerned will have to accredit and appoint mediators, define their duties and responsibilities, as well as provide for the venue.

5. It is not entirely clear as to the meaning of the draft provision in the Article reading "the competent authority may approve such an agreement and declare it enforceable". Reading it literally, the suggestion is unacceptable as it works against the spirit of mediation and conciliation. Mediation or conciliation is voluntary and the parties concerned should not be forced to adopt the agreement if he/she decides to withdraw from it on further consideration. Moreover, matters relating to the approval and enforcement of an agreement reached by mediation or conciliation are subject to the domestic law of the Contracting States and should not be imposed by the Convention.

Article 3: Right to be heard

6. We agree that if the age or degree of maturity of the abducted child permits, his view should be heard and also be taken into account in Convention proceedings. However, the intended scope of the word "hear" is unclear.[3]

7. The Central Authority in the HKSAR is not exercising an adjudicating function in any Convention application. It is not practical, necessary or acceptable to make it mandatory for the Central Authority to "hear the child" and as far as possible, the parties in persons, as they may physically be in different Contracting States.

Article 4: Protection measures

8. It is not clear as to the type of protection measures the Article expects of the authorities in the requested States. It is difficult to comment on the Article on this basis. At present, the relevant authorities in the HKSAR will take proper measures to protect the abducted child if the child is or at risk of abuse, harm, etc.

9. Notwithstanding the above, we have the following comments on the Article:

(a) an authority in the requested State is not subject to the instructions from any authority in the requesting State, which is situated in another jurisdiction. The requesting State may, however, inquire about the protective measures to be taken in the requested State;

(b) the protective measures to be taken are subject to the law of the requested State. It may not be possible for the authority in the requested State to assist in the implementation of protective measures in the child's habitual residence;

(c) the relevant authority of the requested State should decide on the appropriate protective measures having regard to the circumstances of each individual case;

(d) such assistance provided by the requested State will be subject to financial and resource constraints; and

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[3] As far as we understand it, "hearing the view of the child" may refer to investigating the living conditions of the child and/or interviewing the child. It may also go as far as the giving of evidence by the child in the hearing of an application under the Convention, by means of an affidavit filed or testimony given in Court.

(e) it is not appropriate to mandate the requested State to assist in implementing protective measures the way the Article proposes. The assistance provided should be limited to "to the extent practicable and appropriate as determined by the relevant authorities" in the requested State, and the protective measures to be taken must be "appropriate and necessary".

Article 5: Information and mutual assistance

10. At present, the Central Authority of HKSAR informs the Central Authority of the requesting State of any steps taken or to be taken after considering the relevant documents and information relating to the alleged wrongful removal or retention provided by the requesting State. The Central Authority in the HKSAR will also inform the counterpart in the requesting State of any significant development, including the outcome of court proceedings, if any. For outgoing requests for the return of a child to the HKSAR, the Central Authority in HKSAR also requests the Central Authorities of other States to keep it so informed.

11. The exchange of relevant information and mutual assistance between the Central Authorities of the requesting State and of the requested State may help facilitate the processing of requests under the Convention. However, any exchange of information is only possible if its implementation will not violate any applicable law, rules and regulations on personal data protection in the requesting State and/or in the requested State. In particular, the access to relevant documents and evidence should be subject to the privacy or secrecy law of each State. They should not be governed by the draft Protocol directly.

12. The meanings of "the competent authorities" and "the authorities of the States concerned" in Article 5 are unclear as to whether they should include bodies other than the Central Authority.

Article 6: Duty to protect and inform after the return

13. Article 6 does not appear to be very useful. On the pragmatic level, there is no legal duty on the private parties to a Convention application to provide the Central Authority with the information of the merits of custody rights of the child and/or any other information of the matrimonial proceedings taken out by them concerning the child. The obligation on Central Authorities to enquire about and/or obtain such kind of information for the purpose of notifying the Central Authority of requested State will likely be practically difficult.

14. Moreover, the scope of "reasoned requests" and definition of "any other public authority of the State" in the Article is unclear. It would be very burdensome on the Central Authorities to monitor the situation of the returned child for a period of one year after return of the child.

Other Comments

15. While we have reservations about the merits of the draft Protocol, we would like to offer some additional comments:

Other possible provisions

16. The issue of costs under the Convention has not been resolved. The draft Protocol should address the issue of costs arising from its possible implementation.

Chapter III: Final clauses

17. There should be provisions dealing with States with more than one system of law applicable in different territorial units, similar to Articles 31-33 and Article 40 of the Convention.

OBSERVATIONS DE L'ESPAGNE

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COMMENTS FROM SPAIN

ESPAGNE - *SPAIN*

Objeciones al Protocolo Adicional al Convenio de la Haya de 25/10/1980

Art. 2: Intentos de mediación o conciliación: Problemas con la legislación interna. No se ha dictado aún ley estatal sobre la mediación, tal como establecía la LEY 15/2005, de 8 de julio, de separación y divorcio, basada en los principios establecidos en las disposiciones de la Unión Europea, y en todo caso en los de voluntariedad, imparcialidad, neutralidad y confidencialidad y en el respeto a los servicios de mediación creados por las Comunidades Autónomas. Las CCAA han dictado su Ley de Mediación.

Si bien se está impulsando la mediación en los Juzgados de Familia, en los casos de sustracción de menores, la competencia está atribuida a los Juzgados de 1ª Instancia del lugar del domicilio del menor.

Art. 4 b): La experiencia en estos casos nos muestra que los Jueces son reacios a establecer visitas en los procedimientos de restitución. Se han denegado en numerosas ocasiones.

Art. 4 c) Precauciones específicas, problemas en su interpretación, plazos para que se adopten, autoridad que debe adoptarlas, y problema especialmente en garantizar la participación en el procedimiento subsiguiente.

Art. 5: El segundo párrafo, si se refiere a la Autoridad Central, imposible. Necesitaríamos unos medios de los que no disponemos.

Art. 6 a): ¿Cómo conseguir esa información?

Art. 6 b) Interpretaciones de lo que pueda suponer “solicitud motivada” y aspectos prácticos. ¿Quién hace las valoraciones? ¿En base a qué informaciones? Posibles abusos.

Observaciones. Los dos últimos párrafos, referido a la aplicación del art. 13 b) convenio Haya: El primer párrafo puede chocar con la interpretación que del art. 13b) hace el nuevo Reglamento europeo 2201/2003. El segundo párrafo, o bien conduce a una nueva interpretación del Convenio Haya o a interpretaciones subjetivas sobre las intenciones del solicitante.